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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 115

GENERAL MOTORS CORPORATION,
Appellant,

v.

STATE OF WASHINGTON, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF MAGAZINE PUBLISHERS ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

AND

BRIEF OF MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICUS CURIAE*

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Of Counsel.

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Magazine Publishers Association, Inc. respectfully moves this Court for leave to file the accompanying brief in this appeal as *amicus curiae*. The consent of the attorney for the Appellant herein has been obtained, but the attorney for the Appellees refused to consent to the filing of a brief by Magazine Publishers Association, Inc. or any other person as *amicus curiae*.

The applicant, Magazine Publishers Association, Inc., has an interest in this case because its members are exposed to the Washington Business and Occupation Tax statute involved in the decision below. They, like the affected Divisions of General Motors Corporation, maintain no establishments or places of business in Washington but sell products and services which are delivered into the State of Washington solely in interstate commerce and, if the de-

cision below stands, may be subject to the burden of the Washington tax. Because of the characteristics of the magazine publishing business and the interpretation of Article I, Section 8, Clause 3 (the Commerce Clause) of and the Fourteenth Amendment (Due Process Clause) to the United States Constitution concerning that business found in *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823 (1938), and subsequent characterizations of that case, the burden of the assailed tax upon magazine publishers probably will not be covered by the briefs of the parties to this appeal. The questions presented by this appeal are constitutionally substantial and, we believe, of great public importance.

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BRIEF OF MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICUS CURIAE*

Statement of the Case

Magazine Publishers Association, Inc. accepts and adopts the statement of the case set forth in the Appellant's jurisdictional statement. Publishers who are members of this association maintain no establishments whatever within Washington and, like the Appellant, conduct no business activities in that state except those related to sales that entail delivery into Washington purely in interstate commerce.

Interest of the *Amicus Curiae*

The *amicus curiae*, Magazine Publishers Association, Inc. is a trade association, the membership of which includes the publishers of practically all well-known magazines of national circulation. Its membership consists of

about 100 publishers of some 275 nationally known and distributed magazines and periodical publications, having a combined circulation of approximately 160,000,000 copies per issue. These include general circulation magazines which are purchased and read by the public in every one of the fifty states and abroad. Members of the Association also publish other nationally known magazines, such as business, farm, religious, scientific, literary, and special interest periodicals, which have extensive circulation to particular readers and in areas where they are of interest.

The publishers provide a complex system of distribution whereby general circulation magazines are delivered on their respective issue dates simultaneously in every city, town and hamlet in the country. In addition to other content, the magazines contain advertisements, disseminated as a service to advertisers. Magazines are sold either as single copies or by subscription for varying terms. Advertising service is sold advertisers at contract rates.

Approximately 73% of the 160,000,000 copies per issue are sold by subscription, delivered directly by mail from the publisher to the subscriber. In this respect the publishers, unlike the Appellant, make "sales at retail" as defined in the Washington statute. . . .

The balance, or approximately 27% of the copies are distributed to wholesalers who in turn distribute them to retailers for single copy newsstand sale. In this respect the publishers are "wholesale distributors" as defined in the Washington statute.

Sections 82.04.250 and 82.04.270, respectively, of the Revised Code of Washington impose the tax on persons making sales at "retail" and at "wholesale".

Both methods, retail and wholesale, involve thousands (or even millions) of individual interstate shipments by a publisher, by United States mail or other carrier, a percentage of which find their way into Washington.

The Washington statute (§ 82.04.280) also purports to impose a like tax on "every person engaging within this state in the business of: (1) Printing, and publishing newspapers, periodicals or magazines." However, since none of the nationally circulated magazines of the association's members are printed or published in Washington, only the taxes on "retailers" or "wholesale distributors" could be considered to apply to them.

While thus defined as "retailers" and "wholesale distributors" under the Washington act, neither the association's members nor any agents of those members do anything in Washington in connection with sales except promotion or solicitation and supervision of sales in interstate commerce.

Summary of Issues

Four basic questions in this case are raised in the light of the magazine publishing business, namely:

(1) Is Washington's unapportioned gross receipts tax, exacted from sales delivered into that State, repugnant to the Commerce Clause of the United States Constitution when applied to a foreign corporation conducting no business in the State other than sales purely in interstate commerce?

(2) Is Washington's unapportioned gross receipts tax, laid on the privilege of selling and delivering goods and services within the State, repugnant to the Commerce Clause when applied to an out-of-state magazine publisher?

(3) Is a Washington tax measured by unapportioned gross receipts which exempts local manufacturers who pay a tax only as sellers an invalid discrimination against interstate sellers required to pay tax at the same rate?

(4) Is Washington's unapportioned gross receipts tax, levied for the privilege of engaging in business within the

State, repugnant to the Due Process Clause of the Fourteenth Amendment to and the Commerce Clause of the United States Constitution when applied to sales accepted and fulfilled wholly outside that State but made to customers located within that State, when the seller's only activities within the State consist of promotion or solicitation and supervision of sales in interstate commerce and the seller has no local establishment of any kind within the State for handling such sales or for any other purpose?

ARGUMENT

An unapportioned gross receipts tax levied for the privilege of making sales purely in interstate commerce, unrelated to any other business or activity in the taxing jurisdiction, imposes an unconstitutional burden and condition upon interstate commerce and by virtue of its extraterritorial effect denies interstate sellers due process of law.

First—the Washington tax is levied upon the entire gross receipts derived from sales in interstate commerce. The putative taxpayer engages in no local commerce incident to the disputed tax and there is no question present of mingling an interstate business with a local business and thus no want of proof that the receipts sought to be taxed are solely and exclusively derived from interstate commerce.

The decision below of the Supreme Court of Washington concludes that the tax complies with constitutional requirements because that Court finds, erroneously we believe, that the tax meets two tests: (1) "the discrimination test", and (2) "the multiple burden test." While state taxes have been invalidated on both grounds, these surely are not the sole "tests".

A long line of decisions extending well over a century have proscribed taxes such as this, levied by states upon the entire volume of gross receipts from interstate sales, be-

cause such taxes constitute a barrier to the free flow of commerce among the states.[1]

The law was summarized by the Court as long ago as *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S.

[1] *Brown* v. *Maryland*, 25 U. S., 12 Wheat. 419, 429, 6 L. ed. 678, 682 (1827); *Passenger* cases, 7 How. 48 U. S. 281, 12 L. ed. 702 (1849); *Almy* v. *State of California*, 12 How. 65 U. S. 169, 16 L. ed. 644 (1861), as applied in *Philadelphia & Reading Railroad Co.* v. *Commonwealth of Pennsylvania (State Tax on Railway Gross Receipts)*, 15 Wal. 82 U. S. 232, 21 L. ed. 146 (1873); *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347 (1876); *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015 (1878); *Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067 (1882); *The Glouster Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158 (1885); *Pickard* v. *Pullman Co.*, 117 U. S. 34, 29 L. ed. 785 (1885); *Fargo* v. *Michigan*, 121 U. S. 230, 30 L. ed. 888 (1887); *Philadelphia and Southern Mail Steamship Company* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200 (1887); *Western Union Telegraph Company* v. *Pennsylvania*, 128 U. S. 39, 32 L. ed. 345 (1888); *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 392 (1890); *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649 (1891); *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043 (1895); *Galveston Harrisburg, etc. Railway Co.* v. *State of Texas*, 210 U. S. 217, 52 L. ed. 1031 (1908); *Meyer, Auditor of the State of Oklahoma* v. *Wells Fargo and Company*, 223 U. S. 298, 56 L. ed. 445 (1912); *Minnesota Rate Cases*, 230 U. S. 352, 400, 57 L. ed. 1511, 1541 (1912); *Crew Levick* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, 62 L. ed. 295 (1917); *Sonneborn Bros.* v. *Cureton (Keeling)*, 262 U. S. 506, 67 L. ed. 1095 (1923); *New Jersey Bell Telephone Company* v. *State Board of Taxes and Assessments of New Jersey*, 280 U. S. 338, 74 L. ed. 463 (1930); *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218, 77 L. ed. 710 (1933); *Pacific Telephone Company* v. *Tax Commission*, 297 U. S. 403, 80 L. ed. 761 (1936); *Fishers Blend Station, Inc.* v. *State Tax Commission, et al.*, 297 U. S. 650, 80 L. ed. 961 (1936); *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 82 L. ed. 69 (1937); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155 (1937); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 82 L. ed. 1365 (1938); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. ed. 272 (1939); *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 88 L. ed. 1304 (1944); *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. ed. 265 (1946); *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422, 91 L. ed. 998 (1946); *Railway Express Agency, Inc.* v. *Commonwealth of Virginia*, 347 U. S. 359, 98 L. ed. 757 (1954).

411, 32 L. ed. 229 (1888) where the Court stated (127 U. S. 411, 428):

> "Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax assessed * * * upon the receipts * * * which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or *apportionment*, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce." [Emphasis supplied]

Since all of the receipts in the case at bar were derived solely from interstate commerce, the tax cannot properly be applied to them.

The Court has stated regarding a gross receipts tax:

> "Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." (*Freeman* v. *Hewit*, 329 U. S. 249, 256-7, 91 L. ed. 265, 274)

Norton v. *Department of Revenue of Illinois*, 340 U. S. 534, 95 L. ed. 517 (1951) does not overrule any of the foregoing cases. *Norton* held that sales in interstate commerce—in that case mail order sales—were immune from the reach of an Illinois gross receipts tax. The only real question in *Norton* arose because the seller there maintained a place of business where local retail sales were made from stock and, it appeared, also "channeled" other sales requiring delivery from outside the State through its local store, and, since there was lack of proof as to

what sales were local and what interstate, the case was remanded (Cf., *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 88 L. ed. 1313 (1944)).

In the case at bar there is no local establishment and, thus, no confusion or question of proof of a distinction between intrastate and interstate sales. All of the sales here taxed are clearly and exclusively interstate.

The decision below is premised entirely upon the finding that "business activities having a relation to wholesale sales are conducted in Washington"; but those wholesale sales were interstate commerce and the related "business activities" were in furtherance of and an integral part of that commerce.

Despite the numerous opinions of the Court pertinent to this case, the Washington Supreme Court based its decision upon two decisions of the Court, neither of which is in point, namely that part of, *Norton Company* v. *Department of Revenue of Illinois (supra)* pertaining to orders channeled through a local store and *Northwestern States Portland Cement Co.* v. *Minnesota (Williams* v. *Stockham Valves and Fittings, Inc.)*, 358 U. S. 450, 3 L. ed. 2d 421 (1959), and upon the *per curiam* affirmance of *Field Enterprises, Inc.* v. *Washington*, at 352 U. S. 806, 1 L. ed. 2d 39 (1956). *Norton* is discussed above. *Field Enterprises*, to the extent it is reconcilable with the reported opinions, related to sales from an in-state establishment.

Reliance upon *Northwestern States Portland Cement* in considering the application of an *unapportioned gross* receipts tax is a patent misapplication of that decision. *Northwestern States Portland Cement* dealt with an *apportioned net* income tax and not an unapportioned gross receipts tax. The distinction between such taxes is of controlling importance as has repeatedly been pointed out by the Court. (*Peck* v. *Low*, 247 U. S. 165, 62 L. ed. 1049

(1918); *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 62 L. ed. 1135 (1918); *Shaeffer* v. *Carter*, 252 U. S. 37, 64 L. ed. 445 (1920); *Atlantic Coastline* v. *Dawton*, 262 U. S. 413, 67 L. ed. 1051 (1923); *Freeman* v. *Hewit*, 329 U. S. 249, 91 L. ed. 265 (1946) and the discussion in *Northwestern States Portland Cement* itself, where Mr. Justice Clark stated at page 460 as the basis for his opinion:

> "These cases stand for the doctrine that the entire *net income* of a corporation generated by interstate as well as intrastate activities may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." [Emphasis supplied]

Mr. Justice Harlan stated, page 470,

> "This Court has consistently upheld state *net* income taxes of general application so applied as to reach that portion of the profits of interstate business enterprises fairly *allocable* to activities within the State's borders." [Emphasis supplied]

Thus none of the discussion in any of the opinions in *Northwestern States Portland Cement* contains any inference that would justify an unapportioned gross receipts tax.

Furthermore, because the decision in *Northwestern States Portland Cement* represented a departure from the previous pronouncements of the Court (Cf. Whittaker, J. and Frankfurter, J. dissents), the Congress promptly enacted Public Act 86-272 of 1959. Public Act 86-272 prohibits the imposition by any state of even an apportioned net income tax measured by income from interstate commerce, where the taxpayer's only activity in the taxing state consists of soliciting and fulfilling sales in interstate commerce. Under the facts in the case at bar the Appellant does not event solicit orders for sales of its products in Washington. It operates pursuant to "Dealer Selling Agreements" (executed outside Washington) under which

dealers place orders. In any event, those agreements call for sales in interstate commerce and the performance of such contracts is within the scope of the Commerce Clause. (*United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 88 L. ed. 1440 (1944). One statement by Mr. Justice Black in *South-Eastern Underwriters Ass'n* (at 322 U. S. 533, 547, 88 L. ed. 1440, 1454), is particularly apropos of the present dispute.

> "We may grant that a contract of insurance as a thing apart from negotiation and execution does not itself constitute interstate commerce. * * * But it does not follow from this that the Court is powerless to examine the entire transaction, of which the contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce."

Without question, the events producing the receipts Washington here seeks to tax comprise a chain in interstate commerce.

While the opinion below does contain a recitation of "incidents" considered to bestow taxing power—some of which even have their situs outside Washington—they may all be summarized within the phrase "dealer representation" which means simply the supervision and enforcement of the "Dealer Selling Agreements".[2] Such "incidents", like the "incident of 'solicitation'" could only be "segregated by an act of mental gymnastics and made the fulcrum of the tax," (*Nippert* v. *Richmond*, 327 U. S. 416, 423, 90 L. ed. 760, 764 (1946)).

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[2] Actually, although the recitation is extensive, only three "incidents" are noted: (a) sales incentive contests and programs, (b) national and local advertising, and (c) training dealer personnel in automobile service procedures including reconditioning used automobiles. The first two "incidents" are customary sales promotion devices; the third "incident" is a constituent part of fulfillment by dealers of "Dealer Selling Agreements" requiring compliance with standards of dealer performance.

As was stated by Mr. Justice Taft in *Board of Trade* v. *Olsen*, 262 U. S. 1, 36, 67 L. ed. 839, 850 (1922), the Court's decisions in regard to contracts within the Commerce Clause have,

> "• • • refused to permit local incidents of great interstate movement which, taken alone, were intrastate to characterize the movement as such."

The substantial public importance of the case at bar relates to those numerous business concerns, small and large, who do nothing within a taxing jurisdiction but promote interstate commerce, solicit orders to be fulfilled in interstate commerce, or, as is very often the case, receive orders initiated by the purchaser without any solicitation by the seller, and then, having contracted for such orders, supervise fulfillment in various ways.

Certainly the only business activities pertinent to the case at bar are those related to the fulfillment of orders which in the words of Public Act 86-272 are "sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." Washington's attempted broad application of the tax in question to out-of-state sellers would be prohibited by that Federal Law if this were an apportioned net income tax. It is inconceivable that it was the intent of Congress to prohibit an *apportioned net* income tax in this type of situation while permitting an *unapportioned* tax on the entire *gross* proceeds from interstate commerce. There was no reason for Congress to include unapportioned gross receipts taxes within the prohibition of Public Act 86-272 because long before the *Northwestern States Portland Cement* decision, the foregoing decisions of the Court had already clearly proscribed such taxes upon the interstate situations comprehended by the Federal act, i.e., where "the only business activities within such State" consist of the solicitation of orders sent outside the State for approval or rejection, filled from a point outside the State; whether or not the orders are solicited by "various sales and incentive contests and programs, • • • national and local adver-

tising programs * * * joint programs * * * to assist the dealers" (opinion below) or any other "incident" of solicitation.

Secondly—the tax in question offends the Commerce Clause for the separate and distinct reason that it requires payment of a tax as a condition to conducting purely interstate business in Washington. The statute, without equivocation, states that "there is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities" in Washington (Washington Revised Code, Sec. 82.04.220). To the extent that the Washington Tax Commission has assessed this tax on a person seeking to engage solely in interstate business, as the Commission has done here, the tax is levied and collected for the sole privilege of engaging in interstate commerce. Again, a voluminous array of decisions of the Court has held that any state statute which interferes with interstate commerce by demanding payment of a tax as a condition to engaging in such commerce within a State is an invalid burden on the interstate commerce. The negotiation of sales of goods for the purpose of introducing them into the state in which the negotiation takes place is interstate commerce and must be protected from local interference, taxes or other burdens.[3]

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[3] *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694 (1887); *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565 (1881); *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653 (1884); *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311 (1888); *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391 (1890); *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649 (1891); *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719 (1894); *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785 (1902); *Norfolk & Western Railroad* v. *Sims*, 191 U. S. 441, 48 L. ed. 254 (1903); *Rearick* v. *Pennsylvania*, 203 U. S. 507, 51 L. ed. 295 (1906); *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 54 L. ed. 678 (1910); *Barrett* v. *City of New York*, 232 U. S. 14, 58 L. ed. 483 (1914); *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 61 L. ed. 1181 (1917); *Heyman* v. *Hays*, 236 U. S. 178, 59 L. ed. 527 (1915); *Looney* v. *Crane Co.*, 245 U. S. 178, 62 L. ed. 230 (1917); *International Paper*

(Footnote continued on next page)

Third—While Appellant, in its main brief, will undoubtedly show that the Washington tax discriminates against interstate sellers, we note that it is not even necessary to show discrimination in order to establish that a tax unconstitutionally burdens commerce (*Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, 69 L. ed. 916 (1925), *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 312, 82 L. ed. 1365, 1369-70 (1958)). No novel feature is found in the Washington statute in this regard. Massachusetts employed a similar device of attempting to tax foreign corporations for the privilege of making sales in Massachusetts while, at the same time, imposing a tax on domestic corporations for business done there as the Washington statute here in controversy imposes a tax on foreign sellers and a similar tax on domestic manufacturers or sellers. However, the Massachusetts tax differed from the present, in that, as noted in the *Alpha Portland Cement* opinion (268 U. S. 203, 215, 69 L. ed. 916, 923) there was "no discrimination in the statute against interstate commerce" because of an equitable "allocation" of income. Nevertheless, the tax on foreign corporations selling in Massachusetts was held to be an excise "demanded on account of interstate business" and, therefore, a burden on interstate commerce and "invalid without regard to measure or amount" (268 U. S. 203, 217, 69 L. ed. 916, 923).

Fourth—The tax is invalid because it includes in its measure receipts from activities carried on in other states,

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Company v. *Massachusetts*, 246 U. S. 135, 62 L. ed. 624 (1918); *Cheney Brothers Company* v. *Massachusetts*, 246 U. S. 147, 62 L. ed. 632 (1918); *Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439 (1925); *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, 69 L. ed. 916 (1925); *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 69 L. ed. 982 (1925); *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156 (1931); *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218, 77 L. ed. 710 (1933); *Best & Company, Inc.* v. *Maxwell*, 311 U. S. 454, 85 L. ed. 275 (1940); *Nippert* v. *City of Richmond*, 327 U. S. 416, 90 L. ed. 760 (1946); *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573 (1951); *Memphis Steam Laundry Co.* v. *Stone*, 342 U. S. 389, 96 L. ed. 436 (1952).

outside the legislative jurisdiction of Washington. It thus not only burdens interstate commerce but also denies due process of law. All of Appellant's manufacturing, storage, distributing and most of its selling operations related to deliveries of its products into Washington took place in other states. The receipts sought to be taxed were derived not only from production and handling outside Washington but from selling operations which, except for minimal aspects, were conducted elsewhere. Yet, Washington seeks to tax the entire amount of gross receipts from all of those out-of-state operations whenever they are followed by delivery of products into Washington.

Thus, in the language of Mr. Justice Holmes in *Oklahoma* v. *Wells Fargo*, 223 U. S. 298, 302, 56 L. ed. 445, 448 (1912),

> "For, to recur to the statute, it is not simply a tax on all gross receipts within the state, * * * it is a tax on a proportion of total gross receipts, a considerable part of which * * * the state has no right to tax."

And, as stated in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 139, 82 L. ed. 155, 161 (1937) concerning a West Virginia gross receipts tax, a statement particularly pertinent to the case at bar except for the State's name therein:

> "A large part of respondent's work was performed at its plant at Pittsburgh. * * *
>
> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. * * * [A]n *apportionment* would in any event be necessary to limit the tax accordingly." [Emphasis supplied]

And again the Court stated in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311, 82 L. ed. 1365, 1369 (1938):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without *apportionment*, receipts derived from activities in interstate commerce * * *." [Emphasis supplied]

The tax at bar has the same two faults as the tax in the *Adams* case, namely, that it is imposed upon receipts derived (1) entirely from activities in interstate commerce and (2) from the employment of extra-state property and labor, utilized in making those very sales that Washington proposes to permit only if the tax is paid. To the same effect are *Wallace* v. *Hines*, 253 U. S. 66, 69, 64 L. ed. 782, 784 (1920); *Cooney* v. *Mountain States Telephone and Telegraph Company*, 294 U. S. 384, 79 L. ed. 934 (1934); *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77, 82 L. ed. 673 (1938). Furthermore, even if the tax in question were a net income tax rather than a gross tax and thus a permissible exaction from interstate income, it would still be necessary to allocate the income so as to exclude from taxation the portion attributable to the out-of-state enterprise producing the income. (*Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 75 L. ed. 879 (1931)).

In this connection, it may be noted that a minority of the Court, in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L. ed. 1613 (1949) would have sustained a tax on gross receipts derived from interstate commerce for the same two reasons relied upon by the Lower Court in this case, namely (1) no "discrimination", and (2) no "multiple burden"; *Galveston and Harrisburg Railway* v. *Texas*, 210 U. S. 217, 52 L. ed. 1031 (1908) to the contrary notwithstanding. However, the premise of those Justices who adopted that view in *Interstate Oil Pipe Line* for sustaining the tax there was that, even though interstate transportation was the subject of the tax, since *all* the property and activities producing the income were within the taxing state, there was no attempt to tax activity carried on outside the jurisdiction, the receipts were thus automatically allocated and no further "apportionment" was necessary. But such are not the facts of the case at bar. Here none of the property producing the receipts is within Washington. Even under that minority doctrine in *Interstate Oil Pipe Line*, this tax is invalid.

Moreover, the doctrine espoused by the minority in *Interstate Oil Pipe Line* and followed by the Court below in the case at bar, was rejected by this Court in *Spector Motor Service Co.* v. *O'Connor*, 340 U. S. 602, 610, 95 L. ed. 573, 579 (1951) and in that case the taxing statute did purport to allocate income to those phases of the commerce incident to the taxing state.

All of the foregoing brings us to *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823 (1938), a decision of particular import to magazine publishers. There, in a case arising on demurrer, the Court held as a matter of law that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation" (303 U. S. 250, 258, 82 L. ed. 823, 829). Since this "business" was held to be a local one, the full receipts from the sale and distribution of the advertising were regarded to be within the taxing powers of the state where the "preparing, printing and publishing" were done, even though the taxed receipts were earned only from the "business" of circulating the advertising. In those circumstances, the Court made the assumption that the receipts could not be taxed in any jurisdiction other than where the "preparing, printing and publishing" were done (if they were all done in the same state) and then proceeded, by *obiter dictum*, to enunciate, for the first time in any reported opinion, the "multiple burden" test as an "*added reason*" for sustaining the tax.

The *Western Live Stock* dictum was recognized as a "new doctrinal trend" (*Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 814 (2d Cir. 1944); *Spector Motor Service, Inc.* v. *O'Connor*, 181 F. 2d 150, 153 (2d Cir. 1950)), but when the Circuit Court sought to apply this "new doctrinal trend" to sustain a tax on interstate income, its decision was reversed in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573 (1951).

As stated by the Washington Supreme Court, the Court from which the present appeal is taken, in *B. F. Goodrich* v. *State of Washington*, 38 Wash. 2d 663, 231 P. 2d 325 (1951), cert. den. 342 U. S. 876, 96 L. ed. 659 (1951):

> "* * * In resolving these principles, the court has not always been doctrinally consistent, and at least from the time (1938) of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546, 115 A. L. R. 944, the relevant cases have been confusing and contradictory in rationale."

Thus was seeded much of the "tangled underbrush of past cases" referred to by Mr. Justice Clark in *Northwestern States Portland Cement Co.* v. *Minnesota (Williams* v. *Stockham Valves and Fittings, Inc.)*, 358 U. S. 450, 3 L. ed. 2d 421 (1959).

Although the *Western Live Stock* dictum has been repeated frequently, the "*added* reason" given therein for sustaining a tax has never been controlling in any decided case and whenever it might have been, the doctrine has been flatly rejected (*Nippert* v. *Richmond*, 327 U. S. 416, 90 L. ed. 760 (1946); *Joseph* v. *Carter and Weeks Stevedoring Co.*, 330 U. S. 422, 91 L. ed. 998 (1946); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 96 L. ed. 436 (1952); *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 98 L. ed. 583 (1954) and compare *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. ed. 272 (1939) where the Court invalidated an assessment of the Washington Occupation Tax but suggested that the defect might be cured by apportionment).

If a business can be carved up into "separate businesses" such as "printing" without selling, as was done in *Western Live Stock* or separate "activities" such as "selling" alone as is attempted by the statute at bar, the question remains as to whether and how a state may tax any one of the pieces. Separate taxes by countless municipalities as well as states on various "activities", "incidents" or pieces of a magazine publishing business, each computed

without reference to the others would *per se* seriously hamper the business. The "multiple burden test" of *Western Live Stock* may recognize that this question exists but it does not resolve it. If, as was decided in *Western Live Stock*, "preparing, printing and publishing" a magazine is a separate and local business, it cannot be denied that the negotiation and execution of contracts for advertising and magazine sales and the circulation of the magazine which comprise the rest of the "business"—or businesses—of magazine publishing constitute commerce and, so far as here pertinent, interstate commerce. Any tax on the full value of that commerce is invalid because it burdens interstate commerce (*supra*, p. 5). The sale as well as the shipment, circulation and delivery of the product is commerce (*Danke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239 (1921); *Nippert* v. *Richmond*, 327 U. S. 416, 90 L. ed. 760 (1946)).

It is respectfully submitted that for these reasons the appeal herein should be granted and the judgment of the Washington Supreme Court reversed.

Respectfully submitted,

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